UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	**Case No. 4:05-cv-00329-GKF-PJC** **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' "MOTION IN LIMINE TO PRECLUDE ARGUMENT, QUESTIONING OR EVIDENCE THAT ALLEGED AGENCY INACTION WOULD PRECLUDE ISSUANCE OF THE REQUESTED PERMANENT INJUNCTIVE RELIEF" (DKT. NO. 2433)**

Defendants jointly oppose Plaintiffs' motion in limine at Docket No. 2433 requesting that this Court preclude all argument, questioning, and evidence about actions or inactions of "agencies." Although Plaintiffs' motion is facially couched as seeking to preclude agency evidence regarding a narrow subset of injunctive issues, the motion seeks to bar all use of agency inaction evidence by arguing that "[e]ven if it were somehow minimally relevant, its tendency to confuse issues, mislead the jury, or cause undue delay or waste of time makes it inadmissible." (Dkt. No. 2433 at 5.) Plaintiffs' motion improperly seeks to foreclose Defendants from even mentioning at trial one of the most critical flaws in Plaintiffs' entire case, a flaw that undercuts every claim set to be tried. Because such argument, questioning, and evidence is highly probative and fully admissible, and because its exclusion would both work severe prejudice to Defendants and leave the Court with an inaccurate and incomplete factual record, the Court should deny the motion in limine.[1]

[1] As a threshold matter, Plaintiffs are mistaken in asserting that "Defendants have not disputed… that land application of wastes generated by Defendants' birds continues to the present time, and Defendants make no sign of ceasing the challenged waste disposal practices."

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Plaintiffs' motion asks the Court to bar evidence of agency action or inaction by (at least): 1) the various Oklahoma State agencies charged with protection of the environment, maintenance of the State's scenic rivers, protection of human health and safety, regulation of drinking water, and the regulation of agricultural activities; 2) all agencies of the State of Arkansas; 3) the Interstate Compact Commission, 4) the U.S. Environmental Protection Agency; and 5) all organs of the Cherokee Nation. Plaintiffs hinge their motion on a claim of irrelevance, contending "that no legal or equitable basis exists" for Defendants to argue about or present evidence regarding the fact that "various agencies" have not taken action with respect to the injuries alleged by Plaintiffs, a fact that Plaintiffs note bears upon the propriety and scope of the requested injunctive relief. (Dkt. No. 2433 at 2.) Plaintiffs mistakenly contend that "it is clear that argument and evidence on this issue [of agency inaction] would be irrelevant and an improper distraction." (Id. at 4.)

To the contrary, such argument and evidence is strongly relevant in multiple ways, and equity and basic fairness demand that Defendants be allowed to offer this evidence and assert these key arguments at trial.

A. Evidence, Argument, and Questioning About Agency Inaction Is Highly Relevant in Numerous Respects.

"Evidence is considered relevant under the federal rules if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Owner-Operator Indep. Drivers Ass'n

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(Dkt. No. 2433 at 1.) In fact, as Plaintiffs are well aware, four of the Defendants (Cargill, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; and Peterson Farms) do not currently contract with poultry growers in the IRW, and thus have no arguable connection to any present land application of poultry litter.

v. USIS Commer. Serv., 537 F.3d 1184, 1193 (10th Cir. 2008) (quoting in part Fed. R. Evid. 401); accord, e.g., United States v. Beltran-Garcia, 2009 U.S. App. LEXIS 17070, at *16 (10th Cir. July 28, 2009) (unpublished) ("Evidence is relevant and therefore admissible if it has any tendency to make a fact of consequence more or less likely."). The standard for relevancy is broad and necessarily depends upon the totality of the facts potentially involved at trial.

As a threshold matter, the evidence at issue is relevant and admissible to demonstrate the full context of the complex regulatory systems that govern poultry litter application in Oklahoma and Arkansas. For instance, in Owner-Operator, the Tenth Circuit upheld the defendant's introduction of evidence – over the plaintiffs' objection – regarding various aspects of trucking industry practice and how third party motor carriers used the defendant's product. Among other things,[2] the court held that the industry practice evidence was relevant to the question of whether defendants had committed willful violations of the statutes at issue "because it offered a rational explanation for the [defendant's] system," and it tended to show that any statutory violations were "a reasonable accommodation designed to meet the needs of the industry." Owner-Operator, 537 F.3d at 1193. Considering that the "Rules of Evidence provide a liberal standard for relevance," the Tenth Circuit determined that the trial court properly admitted the industry evidence without a limiting instruction. Id. (citation omitted).

The evidence at issue here provides the same kind of helpful context concerning the practice of poultry litter application, the regulations that govern it, and how Plaintiffs' present claims fit (or do not fit) into that context. As the Court is aware, both Oklahoma and Arkansas extensively regulate the land application of poultry litter. E.g., 2 Okla. Stat. §§ 10-9, et seq.

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[2] Notably, in Owner-Operator, the plaintiffs themselves admitted that the evidence was relevant to negligence. 537 F.3d at 1193.

(Okla. Registered Poultry Feeding Operations Act); Ark. Code Ann. § 15-20-901 (Ark. Poultry Feeding Operations Registration Act). Oklahoma, through its agency ODAFF, regulates the land application of poultry litter as fertilizer in the Oklahoma portion of the IRW. Oklahoma farmers who wish to land-apply poultry litter must obtain *from the State* a farm-specific Animal Waste Management Plan demonstrating that litter use will not cause a nuisance or pollute the State's waterways. 2 Okla. Stat. §§ 9-7.C, 10-9.3, 10-9.5.B.5; 10-9-7.B.1, B.4.a & b; OAC §§ 35:17-5-3(a) & (b)(3), 35:17-5-5(a)(7)(B) & (D). Similarly, the Arkansas Natural Resources Commission regulates the land application of poultry litter in the Arkansas portion of the IRW. Arkansas farmers who wish to land-apply poultry litter must register annually with the State and report a wide variety of data including reporting their location, poultry stock, and agronomic conditions. Ark. Code Ann. §§ 15-20-904(b); 138-00-019 Ark. Code R. § 1902.3; 138-00-022 Ark. Code R. § 2204.1A. The State prohibits land application of litter in the three Arkansas counties of the IRW without an approved Poultry Litter Management Plan and state certification. Ark. Code Ann. §§ 15-20-1108; 138-00-022 Ark. Code R. § 2202.3. Each Plan is site-specific and must contain extensive information about the poultry growing operation and the lands where litter is applied. Ark Code Ann. § 15-20-1107; 138-00-022 Ark. Code R. § 2203.3.B.

Moreover, multiple Oklahoma state agencies have the authority to address violations of Oklahoma's litter regulations, and non-compliance can result in permit revocation, heavy fines, and imprisonment. 2 Okla. Stat. §§ 10-9.11.A.1, B.1.a, & B.4; §§ 10-9.12, 20-26. No such agency has used its enforcement powers here. Rather, during the pendency of this action, Oklahoma has continued to draft and issue permits for the land application of poultry litter in the IRW.

Plaintiffs' Count 7 is based on two general statutory provisions barring pollution: 2 Okla.

Stat. 1 2-18.1 and 27A Okla. Stat. § 2-6-105. The provisions respectively make it unlawful for any person subject to ODAFF's jurisdiction "to cause pollution of any air, land or waters of the state," 2 Okla. Stat. 1 2-18.1(A), and for any person "to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state," 27A Okla. Stat. § 2-6-105(A). Both provisions give primary jurisdiction to specific Oklahoma state agencies, and both mandate that the agencies take action in the event they become aware of such pollution. Specifically, Title 2 demands that the State Board of Agriculture "shall make an order requiring that the pollution cease" if it "finds that any of the air, land, or waters of the state which are subject to the jurisdiction of [ODAFF] pursuant to the Oklahoma Environmental Quality Act have been or are being polluted." 2 Okla. Stat. § 2-18.1(B). Similarly, Title 27A mandates that the Executive Director of ODEQ "shall make an order requiring such pollution to cease" if he "finds that any of the air, land or waters of the state have been, or are being, polluted." 27A Okla. Stat. § 2-6-105(B). It is therefore highly relevant to this case that neither ODAFF nor ODEQ have made such findings or entered such orders. (See, e.g., Dkt. No. 2055-26: Thompson Dep. at 21:22 – 22:4: "Q: Have you as executive director of [ODEQ] made a finding that any one of these companies listed as the defendant in this case has caused pollution of the waters of the state of Oklahoma in the Illinois River Watershed by virtue of management or utilization of poultry litter or poultry waste? A. I have not."; id. at 16:14 – 22:25; Dkt. No. 2055-8: Peach Dep. at 120:12 – 123:15.)

Further, ODEQ, the Oklahoma Department of Health ("ODH"), and the Arkansas State Board of Health all have the power to suspend, limit, or restrict the application of poultry litter in the event of an emergent threat to public health, safety, or welfare. E.g., 27A Okla. Stat. § 2-3-502.E; 63 O.S. § 1-106.B.1; Ark. Code Ann. §§ 20-7-110(b), 20-7-113(b). ODEQ is authorized

to immediately redress public health emergencies. 27A Okla. Stat. § 2-3-502.E. Similarly, ODAH may "investigate conditions as to health, sanitation and safety of … places of public resort" and "take such measures as deemed necessary by the Commissioner to control or suppress, or to prevent the occurrence or spread of, any communicable, contagious or infectious disease … and abate any nuisance affecting injuriously the health of the public or any community." 63 Okla. Stat. § 1-106.B.1.

In this context, the fact that none of these agencies have taken such action here is highly probative of whether such actions in fact need to be taken. ODH does not believe an elevated risk to human health exists in the IRW, and has not issued any Health Alert Network communication involving enteric disease from waters in the IRW. Oklahoma has not employed any of its administrative or police powers – emergency or otherwise – to address either the claimed causes or the claimed effects of any pathogenic bacteria attributable to the land application of poultry litter in the waters of the IRW. Throughout this lawsuit, the Oklahoma Department of Tourism has continued to promote the IRW for recreational uses. The Oklahoma Secretary of the Environment, one of the Plaintiffs in this case, has not urged the Department of Tourism to stop or change such promotions. No Oklahoma agency has posted any warnings or closed any beaches at any recreation area in the IRW based on any presence of any bacteria attributable to poultry litter, and no agency has closed any wells in the IRW based on any presence of any bacteria attributable to poultry litter. Although Plaintiffs claim that much of the environmental and public health harms they allege arise from conduct in Arkansas, Plaintiffs have not even raised with Arkansas the issue of risks from bacteria or what might be done about those risks.

The fact that none of these agencies in either Oklahoma or Arkansas have acted in

response to the environmental harms alleged by Plaintiffs is highly relevant to the merit of Plaintiffs' claims and the justification for their proposed injunctive remedies. See Fed. R. Evid. 401. It is precisely because of both the pertinence and abundance of such agency inaction evidence that Plaintiffs now seek to deprive Defendants of the ability to introduce any such evidence at trial.

1. Evidence of Widespread Agency Inaction Is Relevant to Issues Surrounding Injunctive Relief.

As Plaintiffs implicitly acknowledge by bringing this motion in limine, agency inaction is highly probative to issues surrounding their claims for injunctive relief. In particular, the fact that no agency of the Federal, Oklahoma, Arkansas, or Cherokee Nation governments has taken action with respect to the wide-scale environmental harms and human health dangers alleged by Plaintiffs is relevant to whether any injunctive relief is necessary (or even advisable), as well as to the scope of any such injunction.

Federal courts are reluctant to use their extraordinary injunctive powers where the party requesting the injunction is capable of achieving the same results through its own political and administrative processes without the court's intervention, especially in the RCRA context. See Hallstrom v. Tillamook County, 844 F.2d 598, 601 (9th Cir. 1987) ("Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. … Litigation should be a last resort only after other efforts have failed."). However, as noted above, Oklahoma officials here have ample power under existing state law to abate any imminent environmental or health threat, or stop any continuing trespass or nuisance but have declined to exercise that power. Neither has Oklahoma asked Arkansas to help it in addressing the issue of bacteria in the IRW. All of this evidence is relevant to – and weighs against – any finding that Plaintiffs are entitled to injunctive

relief. See id.

Further, evidence of agency inaction is relevant to the scope of the injunction Plaintiffs' seek. If an injunction were to try to distinguish between the proper and improper land application of poultry litter, the Court would necessarily be placed in a position of determining on a grower-by-grower and field-by-field basis which land applications are proper and which are not. "Courts should be, and generally are, reluctant to issue 'regulatory' injunctions, that is, injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties." Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 277-78 (7th Cir. 1992). That reluctance is particularly justified here, where both Oklahoma and Arkansas already have regulatory agencies with the expertise, the authority, and the legal charge to make just such judgments.

2. Agency Inaction Evidence Affects Facts at Issue for All of Plaintiffs' Claims.

In addition to injunctive issues, agency action / inaction is relevant to nearly every aspect of Plaintiffs' claims that remain to be heard at trial. Despite Plaintiffs' allegations about human health hazards, the Oklahoma agencies charged with protecting public health and the environment, including DOH and ODEQ, have taken no measures to reduce or discourage human contact with the waters of the IRW, recreational or otherwise. In fact, as noted above, the Oklahoma Department of Tourism continues to promote the waters of the IRW for recreation.

This conduct by Oklahoma agencies regarding the waters of the IRW supports the conclusion that there is no "imminent and substantial endangerment to health or the environment" under RCRA, 42 U.S.C. § 6972(a)(1)(B). Further, no agency or arm of the State of Oklahoma has ever considered poultry litter to be a solid waste, ever issued a notice of RCRA violation for poultry litter application, ever ordered anyone to cease and desist from the land

application of poultry litter, or ever issued any regulations treating poultry litter as a solid waste. All of this evidence of agency inaction is directly relevant to Plaintiffs' claims of imminent or substantial endangerment to human health or the environment in the IRW, and their claims that poultry litter constitutes RCRA solid waste under these circumstances.

Oklahoma's regulatory scheme allowing the land application of poultry litter is directed to the growers and those applying the fertilizer, not the poultry integrator Defendants. The facts (1) that no agency has found Defendants in violation of the regulations and (2) that the State has continued its regulatory scheme without interruption are relevant to, among other issues, the State's claim for trespass. For instance, this evidence tends to show that the State consented to any "trespass" here. See, e.g., Williamson v. Fowler Toyota, 956 P.2d 858, 862 (Okla. 1998) ("Trespass involves an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession. Stated another way, a trespasser is one who enters upon the property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in the performance of any duty to the owner or person in charge or on any business of such person, but merely for his own purposes, pleasure, or convenience, or out of curiosity." (internal citations omitted)); Berglund v. Town of Asher, 2008 U.S. Dist. LEXIS 52161, at *37-38 (W.D. Okla. July 8, 2008) (granting summary judgment for defendants where under the circumstances "it was reasonable for them to believe they had implied, if not actual, consent to enter").

This evidence also tends to show that Plaintiffs consented to any "nuisance." See Walters v. Prairie Oil & Gas Co., 204 P. 906, 908 (Okla. 1922) ("where a riparian landowner sues a group of separate leaseholders for damages for polluting a stream, and the evidence shows that part of the damage inflicted was occasioned … either with the plaintiff's consent or as the

result of the ordinary use of the premises by the [plaintiff's] tenant, the plaintiff will not be entitled to recover from the defendants sued, unless he is able to produce evidence which will enable the court to separate the amount of damage inflicted by the group of defendants sued from the amount of damages resulting from the acts of the tenant ….").

As described above, this agency inaction evidence is highly relevant to the State's remaining Oklahoma statutory allegations under Court 7. It is also relevant to the standards of care pertaining to Plaintiffs' claims for federal and Oklahoma common law nuisance, which Plaintiffs have asserted solely as intentional torts. The fact that no such agency has found the Defendants out of compliance tends to show that Defendants have acted reasonably and prudently. Further, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." 50 Okla. Stat. § 4.

As these few examples illustrate, this Court should reject Plaintiffs' attempt to keep from the factfinder evidence that is probative on so many facts and claims at issue. See Beltran-Garcia, 2009 U.S. App. LEXIS 17070, at *16 ("Evidence is relevant and therefore admissible if it has **any tendency** to make a fact of consequence more or less likely." (emphasis added)). Given the "liberal standard for relevance" in the Federal Rules, Plaintiffs' motion in limine is not well taken. See Owner-Operator, 537 F.3d at 1193.

B. Plaintiffs' Narrow Arguments for Exclusion Are Inapposite.

Rather than addressing the myriad points of relevancy, Plaintiffs' motion focuses exclusively on injunctive issues and argues 1) that the Attorney General has "some authority" to enforce environmental laws – a point that Defendants do not generally dispute – and, 2) that "no laches or estoppel can operate to bar the State's action for injunctive relief." (Dkt. No. 2433 at 2-3.)

As to the first point, Plaintiffs contend without elaboration or basis that because this Court in its discretion declined to stay this case under the primary jurisdiction doctrine in deference to the Oklahoma and Arkansas regulatory agencies' resolution of the issues, Defendants are necessarily precluded from offering at trial any evidence about agency inaction. (Id. at 2.) As counsel for Plaintiffs has explained, "the doctrine of primary jurisdiction … is to ensure the proper relationship between the courts and the agencies and also promote uniformity and consistency in the way that things are done.") (July 5, 2007 Hrg. Tr. at 78:21-24: Dkt. No. 1216.) Thus, rather than entering any findings on the issue of primary jurisdiction, this Court simply exercised its discretion not to employ the doctrine. (Id. at 101:16-19: "And as to the issue of primary jurisdiction, although there are some compelling arguments made by the defendants, with due respect I do believe that plaintiffs carry the day on that issue as well.") Moreover, the question of whether a federal court decides in its discretion not to defer primary jurisdiction to a state agency is an entirely different question than whether that agency's conduct is *relevant* under the Rules of Evidence to the issues before the Court. Thus, the Court's denial of Defendants' Motion to Stay at Docket No. 133 in no way works to prevent Defendants from raising any agency issues or presenting relevant evidence of agency conduct at trial.

In their second point, Plaintiffs' motion in limine essentially asserts an untimely summary judgment motion on Defendants' affirmative defenses of estoppel and laches. Plaintiffs are barred from such a late motion for summary judgment. Hallaba v. Worldcom Network Servs., 196 F.R.D. 630, 635 (N.D. Okla. 2000) (citing Asia Strategic Inv. Alliances Ltd. v. General Elec. Capital Servs., 166 F.3d 346 (10th Cir. 1998), as "finding issue raised in complaint but not pursued on summary judgment may be deemed waived"); see also Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 678 (1st Cir. 1995) (quoted by Hallaba, 196 F.R.D. at 635)

("Even an issue raised in the complaint but ignored at summary judgment may be deemed waived."); Vaughner v. Pulito, 804 F.2d 873, 877 n. 2 (5th Cir. 1986) (quoted by Hallaba, 196 F.R.D. at 635) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived ….").

In any event, like their primary jurisdiction argument, Plaintiffs' estoppel and laches arguments are essentially red herrings and have nothing to do with the issue of relevance on which Plaintiffs based their motion. As Plaintiffs' own argument demonstrates, the issue of whether the State is subject to estoppel or laches is a legal issue, and in fact has been argued as a legal issue elsewhere. (E.g., Dkt. No. 1876 at 18: Defs.' Mot. Summ. J. as to Time-Barred Claims.) Regardless of whether the defenses of estoppel and laches are available and regardless of whether government agency action or inaction would support them, [3] evidence of such action and inaction is nevertheless relevant to the plethora of issues set forth above, none of which Plaintiffs' motion addresses. This evidence must be heard at trial for the record to be full and accurate.

Further, Plaintiffs contend without elaboration that such evidence would be "an improper distraction" at trial, urging the Court to exclude this huge swath of evidence as a matter of

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[3] In fact, Defendants strongly disagree with Plaintiffs' estoppel and laches arguments, but will not waste the Court and Defendants' time and resources with refuting that tangential point in the context of this motion to exclude evidence with clear relevance to other issues. As but one example of the problems with Plaintiffs' position, the Court will recall Plaintiffs contention that "Defendants cannot claim that they relied on any representation by the State and changed their position for the worse." (Dkt. No. 2433 at 3.) Given that Plaintiffs present insistence that following Oklahoma's regulatory scheme necessarily results in violations of its environmental laws, Defendants may fairly contend that the contract growers (whom Plaintiffs allege act on Defendants behalves) changed their position for the worse by relying on Oklahoma's regulatory scheme. (See, e.g., State's S.J. Resp. at Dkt. 2173 at 10: "scientific evidence show[s] that some portion of land-applied poultry waste is *always* transported from fields to waters") (emphasis in original).)

discretion under Federal Rule of Evidence 403. (Dkt. No. 2433 at 4-5.) The Court should reject Plaintiffs' invitation. First, the probative value of this evidence, as discussed above, is so great that it effectively rebuts any Rule 403 claim, particularly given that this trial may well not involve a jury. (See Defs.' Brs. in Supp. Mot. Strike Jury Demand: Dkt. Nos. 2388, 2463.) Second, Plaintiffs fail to explain how this clear statutory and regulatory-based evidence could cause *any* unfair distraction or confusion on the part of the factfinder or mislead the factfinder. See Fed. R. Evid. 403. Plaintiffs' *ipse dixit* assertion notwithstanding, nothing reasonably suggests that the State of Oklahoma would be unduly prejudiced or the factfinder misled by straightforward evidence regarding the State's own agency's powers, authorities, and actions (or lack thereof).

To the contrary, exclusion of this evidence that is highly probative to so many aspects of this case would work severe prejudice to Defendants and introduce error into the trial record. See, e.g., Owner-Operator, 537 F.3d at 1193 (describing abuse of discretion standards).

CONCLUSION

For all of these reasons, the Court should deny Plaintiffs' motion in limine at Dkt. No. 2433 "To Preclude Argument, Questioning or Evidence That Alleged Agency Inaction Would Preclude Issuance of the Requested Permanent Injunctive Relief."

Date: August 20, 2009

Respectfully submitted,

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